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DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

Petitioner,

v.

NEIL MARTIN CHRISMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an individual is validly under arrest and asks to be given access to an area, may the arresting officer accompany the individual into such area without first obtaining a search warrant authorizing entry into such area?

2. When an officer is standing immediately outside the premises in the doorway of the premises and his presence is known to the occupants, one of the occupants being an arrestee who has been allowed to enter the premises; and the officer makes observations of contraband in plain view and such observations are apparent to the occupants of the premises; do "exigent circumstances" exist which would permit the officer to enter the premises under an "exigency exception" to the Fourth Amendment warrant requirement?

TABLE OF CONTENTS

STATEMENT OF CASE 1

APPENDIX A 20

APPENDIX B 33

APPENDIX C 44

TABLE OF AUTHORITIES

Carroll v. United States, 267 U.S. 132 69 L.Ed. 543, 45 S.Ct. 280 (1925)..... 8

Chambers v. Maroney 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970)..... 8

Colorado v. Bannister, ___U.S.___, ___L.Ed.2d ___, 101 S.Ct. 42, 44 n.4 (1980).....7,8

Moffett v. State, 291 Ala. 382, 281 So.2d 630, 632 (1973), cert. denied 414 U.S. 1161 (1974)..... 5

People v. Green, 141 Ill.App.3d 972, 304 N.E.2d 32, 40 (1973), cert. denied 417 U.S. 972 (1974)..... 6

State v. Chrisman, 24 Wn.App. 385, 600 P.2d 1316 (1979).....14,18

State v. Patterson, 192 Neb. 308, 220 N.W.2d 235, 240 (1974)..... 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.....1,2,3,5,6,9

COURT RULES

Supreme Court Rule 17..... 4

OPINION OF WASHINGTON STATE SUPREME COURT

State v. Chrisman, 94 Wn.2d 711, 619 P.2d 971 (1980)

STATEMENT OF CASE

On November 26, 1980, the Washington State Supreme Court entered judgment in the above-entitled matter reversing the Whitman County Superior Court and the Washington State Court of Appeals. A Motion for Rehearing (Motion for Reconsideration) was timely filed, and denied by the Washington State Supreme Court on December 31, 1980.

The case entails an interpretation of the Fourth Amendment to the United States Constitution and its application to the states through the Fourteenth Amendment. The case deals with both the right of a law enforcement officer to accompany an arrestee onto premises when the arrestee voluntarily returns to the premises and what constitutes "exigent circumstances" as a matter of constitutional law. The Washington State Supreme Court

has ruled in effect that if the arrestee requests to return to his premises, that the law enforcement officer may not accompany the arrestee onto the premises without first complying with the warrant requirements of the Fourth Amendment to the United States Constitution. Also, the court found as a matter of law that exigent circumstances did not exist. Therefore, the court reasoned that since the officer did not have a right to be where he was on the premises, that any of his observations were not covered by the "plain view" exception to the warrant requirement and therefore the evidence of contraband derived thereafter should be suppressed as fruit of an illegal search and seizure; that is, that there was no prior justification for the intrusion onto the premises by the officer even in light of the arrest status of the arrestee and

the arrestee's voluntary return to the premises and the officer's probable cause observations from outside the premises. The court held that the arrest status of the individual did not give the officer, in the absence of a warrant, the right to accompany the arrestee and enter the room where he seized the contraband in plain view. Additionally, the court held that even though the officer was standing immediately outside the premises in a doorway of the premises and his presence was known to both the occupants, one of the occupants being an arrestee who had been allowed to enter the premises, and the officer made observations of contraband in plain view and such observations were apparent to the occupants of the premises, that there was no showing of an "exigency exception" to the Fourth Amendment which would have allowed the officer to enter

the premises.

Supreme Court Rule 17 governing the consideration for review by certiorari indicates that when a state court has decided a federal question of substance not previously determined by this Court, or has decided it in a way not in accord with the applicable decisions of this Court, or when a state court of last resort has decided a federal question in conflict with the decision of another state court of last resort, then a Writ of Certiorari would be appropriate. The issues presented in this case fall within the provisions of Rule 17 and review by this Court would be proper.

As to the first question presented for review it is noted that the authority of an officer to accompany an arrestee onto premises involves a substantial federal question and the decision of the

Washington Supreme Court creates a direct conflict with other jurisdictions, the State of Alabama and the State of Illinois. In addition, the decision involves a question of interpretation of the Fourth Amendment of the United States Constitution which has not previously been determined by this court.

The Alabama Supreme Court in Moffett v. State, 291 Ala. 382, 281 So.2d 630, 632 (1973), cert. denied 414 U.S. 1161 (1974), held that an officer was permissibly in the bedroom and the seizure of the pistol in plain view was permissible since the officer had a right to be where he was, tacitly approving the officer's ability to accompany an arrestee to another portion of the premises. Moffett involved a situation where the defendant was arrested without a warrant at the door of his premises and requested of the

officer that he be permitted to go into the bedroom on the premises where he was allowed to go but was followed and accompanied by the arresting officer. After entering the bedroom, the officer saw a pistol in plain view. Additionally in People v. Green, 141 Ill.App.3d 972, 304 N.E.2d 32, 40 (1973), cert. denied 417 U.S. 972 (1974), the Illinois court allowed an officer to accompany a defendant onto the premises (his YMCA room) when the defendant asked to be allowed to voluntarily return to the premises. It is noted that the Washington Supreme Court majority opinion cited no direct authority for its position on this issue (see dissenting opinion which cites ample contrary authority).

Therefore, the Petitioner is asking that this Court review the Fourth Amendment requirements as to search and seiz-

ure and determine when and how those rights attach in determining whether or not an officer may accompany an arrestee onto premises when the arrestee has requested and been allowed to voluntarily return to the premises while the arrest status continues.

As to the second question presented for review, it is a question of substance which has not specifically been determined by this Court. However, the decision of the Washington Supreme Court appears not to be in accord with the applicable decisions of this Court which indicate that exigent circumstances may exist which would allow warrantless entry when it is impractical to acquire a warrant from an impartial magistrate and the officer otherwise has probable cause justifying a search and seizure; see Colorado v. Bannister, ___U.S.___, ___L.Ed.2d ___,

101 S.Ct. 42, 44 n.4 (1980); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970); and Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925). Additionally, the Washington Supreme Court appeared to have decided this federal question in conflict with the decision of another state court of last resort. The Nebraska State Supreme Court has ruled in State v. Patterson, 192 Neb. 308, 220 N.W.2d 235, 240 (1974), that where the information in possession of the officer leads to the conclusion that a crime is being committed in the residence and the officer has evidence which indicates that there is a great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist.

Therefore it is submitted that the question of whether or not the facts of

the case constitute "exigent circumstances" which would constitutionally permit a warrantless entry and seizure of contraband viewed by the officer should be resolved by review of this question by this Court.

As to both questions presented for review, the Fourth Amendment to the United States Constitution states the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The facts of this particular case are as follows: On the evening of January 21, 1978, Mr. Overdahl, carrying a half gallon of gin, walked out of Orton Hall at Washington State University with several student friends on their way to

a party (RP p.3, ln. 25-26). At that moment Officer Daugherty of the Washington State University Police Department arrived at the dorm to investigate an unrelated matter (RP p.3, ln. 5, 13, 19). The officer noticed the bottle of gin and suspected that Mr. Overdahl, because of his youthful appearance, was under the age of twenty-one (RP p.4, ln. 15; RP p.6, ln. 5). He stopped Mr. Overdahl, detained him, and requested identification (RP p.5, ln. 18; RP p.57, ln. 2-4; RP p.5, ln. 3). Mr. Overdahl stated that he would have to go upstairs to his room to get the identification. Officer Daugherty indicated that since he was under his detention, he would not allow him to leave without an officer accompanying him to his room (RP p.5, ln. 22-26; RP p.35, ln. 17-18; RP p.6, ln. 8-12). As they were waiting for the elevator, the officer asked Mr.

Overdahl how old he was. Mr. Overdahl responded that he was nineteen (RP p.6, ln. 10-12).

Upon arriving on the eleventh floor of the dormitory, Officer Daugherty followed Mr. Overdahl down the hallway to his room (RP p.7, ln. 12-14; RP p. 59, ln. 28). Mr. Overdahl pushed open the slightly ajar door and entered an approximately 17' x 11' room. The officer stood in the doorway out in a common public hallway (without entering the premises)(RP p. 7, ln. 28-30; RP p.8, ln. 8-13; RP p.21, ln. 26-28; CP p.18, ln. 10-18; CP p.14, ln. 8-34; RP p. 19, ln. 15-28; RP p.43, ln. 5-30; and RP p.44, ln. 1) and noticed that the room was occupied by another student, Neil Chrisman, the respondent herein. Officer Daugherty testified that Mr. Chrisman appeared visibly nervous upon seeing the police officer (RP p.9, ln. 11-12;

RP p.10, ln. 11-13; RP p.10, ln. 30; RP p.12, ln.8; and RP p.12, ln. 11-14).

After watching the occupants for a short time, Officer Daugherty observed seeds and a pipe lying on a desk eight to ten feet from where he was standing. Based upon his training and experience he immediately recognized the items as contraband (prior to entering the premises). He therefore entered the room and proceeded to examine the seeds and pipe more closely (RP p.13, ln. 26-27; RP, p.17, ln. 2-6; and RP p.18, ln. 27-30). After completing his inspection, he again concluded that the items were contraband and gave the two students their Miranda rights (RP p.19, ln. 28-29; RP p.20, ln. 1-4). Both Mr. Overdahl and Mr. Chrisman indicated that they understood their rights and were willing to waive them (RP p.23, ln. 23-28; RP p.24, ln. 21-22). The officer asked

them if there were any other drugs in the room and Mr. Chrisman handed him a box containing three bags of marijuana (Finding of Fact as to Mr. Chrisman No. 18; Finding of Fact and Motion to Suppress No. 10).

Officer Daugherty radioed for assistance and Officer Kenny arrived shortly thereafter. Officer Kenny informed Mr. Chrisman and Mr. Overdahl that a search of their room was necessary. He explained that they had an absolute right to demand that the police obtain a search warrant, which would take about two hours, or they could consent to a search of their room. He further explained that their consent must be voluntary and that they had a right to refuse consent (RP p.62, ln. 5-25). After conferring in whispers, Mr. Overdahl and Mr. Chrisman agreed to the search (RP p.64, ln. 16-30; RP p.65, ln. 1-6). Prior to signing a

written consent to search form, Mr. Chrisman and Mr. Overdahl were again advised of their Miranda rights. A search of the room yielded more marijuana and also LSD.

Mr. Chrisman and Mr. Overdahl were charged by information with one count of felony possession of marijuana and felony possession of LSD. Prior to the trial, a suppression hearing was held and the defendants moved to suppress all evidence on the basis that all the evidence was tainted as a result of an illegal search and seizure. The trial judge denied the motion. Mr. Chrisman and Mr. Overdahl were tried without a jury and convicted as charged. This conviction was appealed to the Washington State Court of Appeals. In a published opinion the Court of Appeals upheld the defendants' convictions (State v. Chrisman, 24 Wn.App. 385, 600 P.2d 1316 (1979)). The Court of Appeals

indicated that the officer's observation of the contraband in the room and Mr. Chrisman's reaction to the officer's presence were such that if the officer had left the premises immediately after observing the seeds and pipe in an attempt to secure a search warrant, the contraband would likely have been removed during the interim and additionally because drugs are readily disposable, there were sufficient exigent circumstances existing to justify the warrantless search of the room; the drugs permissibly having come into the officer's "plain view". Mr. Chrisman and Mr. Overdahl then filed a Motion for Reconsideration which was denied on the 4th day of December, 1979.

Both defendants then appealed to the Washington State Supreme Court alleging that the seizure was the product of a warrantless search. On March 31, 1980

the Superior Court dismissed the felony probation and expunged the conviction of Mr. Overdahl to facilitate his entry into an advanced Army ROTC program, therefore this petition only concerns Mr. Chrisman. The dismissal was upon joint motion of the petitioner herein and Mr. Overdahl through his legal counsel.

On November 26, 1980 the Washington State Supreme Court ruled in respondent Chrisman's favor and found (see comments in dissenting opinion) that the officer could not enter the room without a warrant even to accompany an arrestee who had requested to be allowed and had been allowed to voluntarily return to the room in question and additionally found that at the time of the officer's entry into the room that there were no exigent circumstances that justified a warrantless entry, rejecting the application of "plain

view" and the applicability of the exception to the warrant requirement for exigent circumstances.

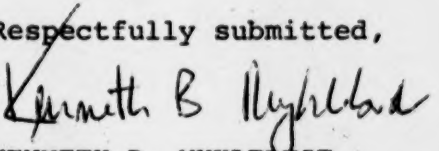
Although the Washington State Supreme Court Opinion indicates exigencies were not argued, this is an apparent reference to exigencies other than the observations made by the officer outside the room, since the court declined to decide where the officer was originally located, labeling such as "niceties" (page 5 of the court's opinion). There is no question that exigencies were argued by the petitioner at every stage of the proceedings in this matter (State's Trial Brief at Superior Court, filed the 20th day of March, 1978, p. 3-6; Trial Court's Findings of Fact, CP p. 23-27; Superior Court's Memorandum Opinion on exigent circumstances to justify entry into the room, CP p.19, ln. 31-32; CP p.20, ln. 1-6;

State's original brief to appellate court, p. 18-20; Court of Appeals Opinion at p. 390 accepting the State's argument concerning exigent circumstances, State v. Chrisman, 24 Wn.App. 385, 600 P.2d 1316 (1979); and State's Answer to Defendant's Motion for Discretionary Review to Washington State Supreme Court, p. 1-5).

The Petitioner is alleging that the ruling of the Washington State Supreme Court is in error, in conflict with the above cited case authority and presents issues which have not been previously ruled on by this Court, and that the ruling of the Washington State Supreme Court has erroneously held that an officer may not accompany an arrestee who has requested and been allowed to voluntarily return to the premises and that there were no exigent circumstances to justify the entry of the officer onto the premises

without a warrant. Therefore this matter should be reviewed by this Court.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	Nos. 2959-III and 2991-III
v.	)	Division Three
NEIL MARTIN CHRISMAN and CARL PHILIP OVERDAHL, Appellants.	)	FILED Oct 4 1979

MITCHELL, J.*--On the evening of January 21, 1978, Carl Overdahl, carrying a half gallon of gin, walked out of Orton Hall at Washington State University on his way to a party with several of his student friends. At that moment, Officer Daugherty of the Washington State University police department arrived at Orton Hall to investigate an unrelated matter. Officer Daugherty noticed the half gallon of gin

*Judge James B. Mitchell is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

and suspected that Overdahl was under the age of 21. The officer stopped Overdahl and asked him for his identification. Overdahl replied that he did not have his identification with him and would have to go upstairs to his room and get it. Overdahl asked the officer if he would wait; the policeman said that under the circumstances, he would have to accompany Overdahl to his room.

While they were waiting for the elevator, the officer asked the student how old he was; he said he was 19. Upon arriving at the eleventh floor, the officer followed Overdahl down the hallway to his room. The door was slightly ajar; Overdahl pushed the door open and entered the approximately 17 by 11 foot room. Officer Daugherty leaned against the doorjamb in the open doorway. At the same time, he noticed that the room was occu-

pied by another student, Neil Chrisman, who appeared visibly nervous upon seeing the police officer.

Officer Daugherty watched the two occupants for a few moments before he saw a tray on a desk 8 to 10 feet from where he was standing; the tray contained seeds. A small pipe lay nearby which his experience led him to believe was used for smoking marijuana. At that point, Officer Daugherty entered the room, walked over and examined the seeds and pipe to verify that what he had been observing was marijuana. For the first time, he gave both Chrisman and Overdahl their Miranda rights. They told the officer they understood their rights and agreed to waive them.

The officer then asked them if they had other drugs in the room; Chrisman handed him a small box containing three

plastic baggies of marijuana. Officer Daugherty then called another police officer who arrived shortly thereafter. The officers explained to Overdahl and Chrisman that a search of their room was necessary and they could either consent or the officers would have to get a search warrant. The explanation was given in considerable detail and after it was over, the two students conferred in whispers between themselves for several minutes before giving their consent. The officers again gave them their Miranda rights; both students signed written consent forms prior to the search of the room. The search yielded more marijuana and also LSD.

Chrisman and Overdahl were tried without a jury and convicted of possession of more than 40 grams of marijuana. Neil Chrisman was convicted on a second

count of possession of LSD. Prior to trial, a suppression hearing was held. The trial judge denied defendants' motion to suppress. Both defendants appeal. We affirm.

Overdahl contends that Officer Daugherty was required to give him his Miranda rights before asking for proof of his age since the officer suspected him of being a minor in possession and being underage is an element of that crime. Overdahl further contends that because the officer elicited the incriminating information that he was underage prior to giving him his Miranda rights, the officer did not have a justifiable reason for being in the doorway of the room where he observed the drugs, thus the drugs should have been suppressed. We disagree.

The trial judge found that Officer

Daugherty had properly placed Overdahl under arrest for minor in possession and was therefore entitled to accompany Overdahl to his room. An officer may arrest for a misdemeanor committed in his presence and the fact that a defendant is later formally charged with another offense does not invalidate an otherwise lawful arrest. City of Spokane v. Badeaux, 20 Wn. App. 731, 734, 581 P.2d 1088 (1978). Overdahl makes no allegation that the detention was an illegal arrest. See State v. Byers, 88 Wn.2d 1, 559 P.2d 1334 (1977). As a general rule, incriminating statements made and evidence then subsequently seized while a person is in custody before he has been advised of his Miranda rights are inadmissible. State v. Dennis, 16 Wn. App. 417, 558 P.2d 297 (1976); State v. Galloway, 14 Wn. App. 200, 540 P.2d 444 (1975). Cf. State v.

Hilliard, 89 Wn.2d 430, 573 P.2d 22 (1977); State v. McKeown, 23 Wn. App. 582, 596 P.2d 1100 (1979). Since Overdahl was neither charged with nor tried for the offense of being a minor in possession, his statement to the officer regarding his age was immaterial. Evidence of his age had no bearing on the charge for which he was convicted. We find Overdahl was in lawful custody; and, therefore, Officer Daugherty's accompanying Overdahl to his room was proper and the officer's presence justifiable.

Overdahl argues that Officer Daugherty's entry into his room was an unjustifiable intrusion which does not come within any exception to the requirements of the Fourth Amendment. However, since Overdahl was in custody, Officer Daugherty had a duty to accompany him to his room.

His presence in the doorway was proper. It is undisputed that Mr. Overdahl pushed the door open and entered the room. In order to keep Overdahl within his view, the officer stood in the doorway looking into the room. There is no suggestion that Overdahl attempted to close the door once he had entered. Prior to entering the room, the officer saw from his vantage point in the doorway what he believed was contraband. Only at that time, did he cross the threshold and seize the pipe and marijuana seeds.

The circumstances here bear a close resemblance to State v. Daugherty, 22 Wn. App. 442, 591 P.2d 801 (1979), and the rationale in that case is applicable. The police suspected that Daugherty had burglarized a safe. The police went to Daugherty's home and walked into the middle of his driveway. One police

officer looking through the open garage doors into the garage saw an object that resembled a safe, partially covered by a tarpaulin. The officers arrested Daugherty, then entered the garage and seized the safe. The court held that Daugherty's driveway was only semi-private and not a constitutionally protected area. Therefore, the officer's observation of the safe from the driveway was not an intrusion upon a constitutionally protected area; he inadvertently "saw the safe in 'open view' and immediately recognized its significance." State v. Daugherty, supra at 444. The seizure of the safe "followed a preintrusion 'open view' observation, in contrast to a post-intrusion 'plain view' observation." State v. Daugherty, supra at 445. The court held, however, that since the safe was not the type of evidence which could be readily destroyed,

no exigent circumstances existed which permitted a warrantless seizure.

As in the above case, Officer Daugherty's observation of the pipe and seeds was a preintrusion "open view" observation from the doorway of Overdahl's room which, like the driveway in State v. Daugherty, supra, was a semi-private area. Unlike the facts in Daugherty, exigent circumstances existed here. Because the drugs could have been readily disposed of while the police officer was trying to obtain a search warrant, sufficient exigent circumstances existed to justify the seizure. The warrantless seizure of drugs which comes within an officer's plain view has been upheld as reasonable. State v. Dickamore, 22 Wn. App. 851, 592 P.2d 681 (1979); State v. Brown, 17 Wn. App. 587, 564 P.2d 342 (1977); State v. Campbell, 15 Wn. App. 98, 547 P.2d 295

(1976); State v. Campbell, 13 Wn. App. 722, 537 P.2d 1067 (1975).

Overdahl and Chrisman next assert that Officer Daugherty was required to knock and announce prior to his entry into the room. RCW 10.31.040 requires that police in carrying out searches or arrests must knock, announce and wait for refusal before making a forcible entry into a residence. State v. Edwards, 20 Wn. App. 648, 581 P.2d 154 (1978); State v. Talley, 14 Wn. App. 484, 543 P.2d 348 (1975). The purpose underlying the knock-and-announce rule is to prevent unnecessary violence, physical destruction of property and unreasonable intrusions into private residences. State v. Hilliard, 18 Wn. App. 614, 570 P.2d 160 (1977). However, strict compliance with the knock-and-announce rule will be excused "when to knock and announce would be to perform a useless

act, . . . or allow the destruction of evidence." State v. Campbell, 15 Wn. App. 98, 101, 547 P.2d 295 (1976). Here, where the police officer was standing in an open doorway with the full knowledge of both occupants, strict compliance with the knock-and-announce rule would have been a useless act.

Finally, Overdahl and Chrisman argue that their consent to search was not validly given. We find no merit to this contention. After Officer Daugherty seized the pipe and marijuana seeds, he immediately advised Chrisman and Overdahl of their Miranda rights. Chrisman then gave the officer additional contraband after he had been advised of his rights. His act of giving the officer more drugs was a testimonial act which required his being advised of his rights. He was so advised and waived those rights. Cf. State

v. Dennis, 16 Wn. App. 417, 558 P.2d 297 (1976). There is nothing in the record to suggest coercion. In fact, the officers called in a resident adviser as a witness in order to avoid just such an accusation. Overdahl and Chrisman conferred at some length about giving their consent to the search and signed written consent forms to that effect. Although written consent is not required, the forms are indicia of a voluntary consent. See State v. Rodriguez, 20 Wn. App. 876, 582 P.2d 904 (1978). We find both students validly and voluntarily consented to the search.

Judgment affirmed.

s/ Mitchell, J.

WE CONCUR:

s/ McInturff, J.

s/ Green, C.J.

APPENDIX B

[No. 46750. En Banc. November 26, 1980.]

THE STATE OF WASHINGTON, *Respondent*, v. NEIL MARTIN CHRISMAN, ET AL, *Petitioners*.

[1] Searches and Seizures — Warrantless Search — Validity — In General. A warrantless search is not valid unless it comes within one of the specific and carefully delineated exceptions to the Fourth Amendment warrant requirement.

[2] **Searches and Seizures — Objects in Plain View — Prior Justification for Intrusion.** A search does not fall within the plain view exception to the warrant requirement unless the State can show a prior justification for the intrusion into the area where the incriminating evidence was inadvertently discovered.

[3] **Searches and Seizures — Warrant — Purpose — In General.** The search warrant requirement of the Fourth Amendment is designed primarily to protect individuals from unjustifiable intrusions into their dwellings or living quarters.

[4] **Searches and Seizures — As Incident to Arrest — Exigent Circumstances — What Constitutes.** The validity of a search incident to an arrest depends upon the existence of exigent circumstances such as a need to seize weapons which could be used in an assault or to effect an escape or a need to prevent the destruction of evidence of the crime.

[5] **Searches and Seizures — Illegal Search — Effect.** Evidence obtained by virtue of information acquired during an illegal search is generally not admissible.

BRACHTENBACH, STAFFORD, and HOROWITZ, JJ., dissent by separate opinion.

Nature of Action: After arresting a college student for possessing intoxicating liquor, a police officer accompanied the student to his dormitory room, observed a pipe and marijuana seeds, arrested his roommate, and made a warrantless search of the room.

Superior Court: The Superior Court for Whitman County, No. C-1799, Philip H. Faris, J., entered a judgment of guilty against the roommate on July 21, 1978.

Court of Appeals: The court *affirmed* the judgment at 24 Wn. App. 385, holding that exigent circumstances justified the police intrusion into the room.

Supreme Court: Holding that the police intrusion into the room was not justified under the circumstances, the court *reverses* the decision of the Court of Appeals.

Aitken, Schauble, Patrick, Neill & Charawell, by *Robert F. Patrick*, for petitioner Chrisman.

Stephen Bishop, for petitioner Overdahl.

Ronald R. Carpenter, Prosecuting Attorney, and *Gerald R. Fuller, Deputy*, for respondent.

DOLLIVER, J.—Defendants Carl Overdahl and Neil Chrisman, students at Washington State University, were tried without a jury and convicted of possession of more than 40 grams of marijuana, a felony. Chrisman was also convicted of possession of lysergic acid diethylamide (LSD). Both defendants appealed and the Court of Appeals affirmed their convictions. *State v. Chrisman*, 24 Wn. App. 385, 600 P.2d 1316 (1979). They then petitioned this court for review. The charges against Overdahl, however, were subsequently dismissed, and he withdrew his petition for discretionary review. We accepted review of Chrisman's conviction (93 Wn.2d 1009 (1980)), and reverse.

On the evening of January 21, 1978, defendant Overdahl, carrying a half gallon of gin, walked out of Orton Hall at Washington State University with several student friends on their way to a party. At that moment, Officer Daugherty of the University police department arrived at the dormitory to investigate an unrelated matter. The officer noticed the bottle of gin and suspected that Overdahl was under the age of 21. He stopped Overdahl and requested his identification. Overdahl stated that he would have to go upstairs to his room to get the identification. Officer Daugherty replied that he would have to accompany him to his room. As they were waiting for the elevator, the officer asked Overdahl how old he was. Overdahl responded that he was 19.

Upon arriving on the 11th floor of the dormitory, Officer Daugherty followed Overdahl down the hallway to his room. Overdahl pushed open the slightly ajar door and entered the approximately 17- by 11-foot room. The officer stood in the open doorway and noticed that the room was occupied by another student, defendant Neil Chrisman. Officer Daugherty testified that Chrisman appeared visibly nervous upon seeing the police officer.

After watching the occupants for a few minutes, Officer Daugherty observed seeds and a small pipe lying on a desk 8 to 10 feet from where he was standing. He recognized the pipe as the type used for marijuana, and proceeded to examine the seeds and the pipe more closely.

Concluding that the seeds were marijuana and that the pipe smelled of marijuana, Officer Daugherty gave the two students their *Miranda* rights. Both Overdahl and Chrisman indicated they understood their rights and were willing to waive them. The officer then asked them if they had other drugs in the room and Chrisman handed him a small box containing three small plastic bags of marijuana.

Officer Daugherty radioed for assistance and Officer Kenny arrived shortly thereafter. Officer Kenny informed the defendants that a search of their room was necessary. He explained that they had an absolute right to demand that the police obtain a search warrant which would take about 2 hours, or alternatively they could consent to a search of their room. He further explained that their consent must be voluntary and that they had a right to refuse consent. After conferring in whispers, Overdahl and Chrisman agreed to the search. Prior to signing written consent to search forms, defendants were again advised of their rights under *Miranda*. A search of the room yielded more marijuana and also LSD.

Chrisman and Overdahl were charged by amended information with one count of possession of more than 40 grams of marijuana. Chrisman was also charged with a second count of possession of LSD. Prior to trial, a suppression hearing was held and defendants moved to suppress all evidence on the basis that the evidence was obtained as a result of an illegal search and seizure. The trial judge denied the motion. Defendants were tried without a jury and convicted as charged.

[1] Chrisman contends that Officer Daugherty's initial warrantless examination of the seeds and the pipe amounted to an unconstitutional search and that the evidence seized should have been suppressed. We agree.

> [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

(Footnote omitted.) *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); *State v. Daugherty*, 94 Wn.2d 263, 616 P.2d 649 (1980). Since Officer Daugherty had no warrant when he entered Chrisman's and Overdahl's room, the search was proper only if it fell within one of the "jealously and carefully drawn" exceptions to the warrant requirement of the Fourth Amendment. *Jones v. United States*, 357 U.S. 493, 499, 2 L. Ed. 2d 1514, 78 S. Ct. 1253 (1958); *State v. Daugherty, supra*.

[2, 3] The State asserts that the seizure of the marijuana seeds and pipe was permissible under the "plain view" exception to the warrant requirement. This exception permits warrantless seizure of incriminating evidence discovered in a search of a given area for other specified items pursuant to a valid warrant, or discovered inadvertently after an intrusion otherwise excepted from the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971); *State v. Daugherty, supra*.

The plain view exception will apply only if the following requirements are met: (1) a prior justification for intrusion; (2) inadvertent discovery of incriminating evidence; and (3) immediate knowledge by the officer that he had evidence before him. *State v. Daugherty, supra; State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974), *cert. denied*, 421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407 (1975); *State v. Dimmer*, 7 Wn. App. 31, 33, 497 P.2d 613, *review denied*, 81 Wn.2d 1003 (1972). The burden falls on the State to show that a warrantless search falls within the plain view exception to the warrant requirement. *See Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979); *State v. Daugherty, supra*. A greater burden is placed on officials who enter a home or dwelling without a warrant. The

"'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Payton v. New York*, ___ U.S. ___, 63 L. Ed. 2d 639, 100 S. Ct. 1371, 1380 (1980), quoting *United States v. United States District Court*, 407 U.S. 297, 313, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972).

Some argument is made by defendant that in fact Officer Daugherty was not in the room at the time he observed the seeds and pipe but was standing only in the doorway. The record is in conflict as to whether Officer Daugherty stood in the doorway and then entered the room or whether, while in the doorway, he was in fact in the room. We need not, however, let the result be determined by such niceties. The police officer was in the room at the time he observed the seeds and pipe. The question is: Did he have a right to be there?

We begin by stating the trial court correctly determined Overdahl had been placed under arrest at the time he was apprehended outside Orton Hall carrying the bottle of gin. Overdahl continued to be under arrest when he was accompanied to his room by Officer Daugherty. As the State observes, there was nothing to prevent Officer Daugherty from accompanying Overdahl to his room. Simply because Overdahl was under arrest, however, did not give Officer Daugherty the right to enter the room and, upon seeing the seeds and pipe, to conduct a search—all without a warrant.

One of the difficulties in this case results from the fact that the focus has been on the marijuana rather than the alcohol. But, as the State claimed and the trial court concluded, we concur that the entry into the room was connected with the arrest for possession of alcohol by a minor, and not the possession of marijuana. Once Officer Daugherty entered the room as he followed up on the alcohol arrest, the validity of his observation of the seeds and pipe and the subsequent search depends on the constitutionality of the original entry.

[4] The United States Supreme Court has consistently held a contemporaneous search is justified by such exigent circumstances as,

> the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control.

Chimel v. California, 395 U.S. 752, 764, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969), quoting from *Preston v. United States*, 376 U.S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881 (1964). This case does not fit under the contemporaneous search exceptions.

It is clear from the testimony of Officer Daugherty that the only reason he accompanied Overdahl to the room was so that Overdahl could get his identification. Officer Daugherty said at the time he stopped Overdahl he "believed that I had a minor in possession" and that Overdahl could not go to his room alone to get the identification "because we just don't release people from custody." The arrest of Overdahl was for a minor in possession of alcoholic beverages. There is absolutely no evidence that it was necessary for Officer Daugherty to enter the room to seize a weapon which might be used in an assault, that the bottle of gin was about to be destroyed, or that Overdahl was going to attempt an escape. It was a small room. Officer Daugherty was standing in the one exit, and it was on the 11th story. It was not necessary for the officer to enter the room to make certain Overdahl secured his identification. No exigent circumstances existed to justify this intervention; nor were any claimed by the State.

The circumstances were insufficient to justify an intrusion into Chrisman's room, and therefore the first prong of the plain view doctrine has not been met. Accordingly, there is no need to determine whether the final two requirements have been fulfilled as all three elements must be met before the plain view doctrine applies. *See State v.*

Daugherty, supra. The seeds and the pipe were products of an unlawful search, and the motion to suppress the evidence should have been granted.

[5] The marijuana and LSD seized after Chrisman and Overdahl consented to a search of their room also should have been suppressed. Evidence obtained through exploitation of an illegal search is not admissible. *United States v. Crews*, ___ U.S. ___, 63 L. Ed. 2d 537, 100 S. Ct. 1244 (1980); *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Defendants' consent to search the room following the seizure was voluntary only if obtained "by means sufficiently distinguishable to be purged of the primary taint" rather than "by the exploitation of that illegality" (*Wong Sun*, at 488), such as when a significant intervening event or a considerable lapse of time separates the two. *Wong Sun*, at 485–91; *State v. Byers*, 88 Wn.2d 1, 8, 559 P.2d 1334 (1977). *See United States v. Crews, supra.*

In the present case, the causal chain is short and unbroken. There was no lapse of time or significant intervening event between the unconstitutional entry into the room and Chrisman's consent to search. We hold defendant's consent was the product of an illegal search and thus involuntary. All of the contraband seized must be excluded.

Reversed.

UTTER, C.J., and ROSELLINI, HICKS, and WILLIAMS, JJ., concur.

BRACHTENBACH, J. (dissenting)—I dissent. The officer had in custody an admitted minor in possession of alcohol. The minor initiated the journey to his room to obtain identification.[1]

The majority holds that the plain view exception fails because the officer did not have a prior justification for the

[1]This is not a case where the police arrested a defendant outside his home and then took him inside for the purpose of conducting a warrantless search of his dwelling. *Shipley v. California*, 395 U.S. 818, 23 L. Ed. 2d 732, 89 S. Ct. 2053 (1969).

intrusion. What the majority fails to explain convincingly is why the officer was not entitled to keep the arrested person within his sight. The majority's conclusion does not rest upon any cited authority, but only upon its bare assertion. That conclusion is inconsistent with existing precedent, which indicates the officer was entitled to be where he was. Given this right, all elements of the plain view doctrine were satisfied.[2]

State v. Brown, 132 N.J. Super. 180, 333 A.2d 264 (1975), is precisely on point and contrary to the majority. Defendant was arrested in a motel parking lot on drug charges, and asked if he could go to his motel room to get his jacket. The police consented and accompanied defendant to his room. Upon entry, the police observed in plain view what they believed to be illegal drugs. The appellate division held that the drugs were admissible because considerations of police safety and prevention of a possible escape gave the police the right to enter defendant's room. The possibility of escape was admittedly remote in the present case, but concern for police safety was no less compelling than in *Brown*.

Other cases indicate that if a defendant is arrested at his dwelling and asks for access to some other room, the police may search that room before or after granting his request. *United States v. Mason*, 523 F.2d 1122, 1126 (D.C. Cir. 1975); *United States v. Wright*, 577 F.2d 378, 381 (6th Cir. 1978); *United States v. DeMarsh*, 360 F. Supp. 132, 137 n.4 (E.D. Wis. 1973); *see* Kelder, *Criminal Procedure*, 30 Syracuse L. Rev. 15, 68 (1979). If Officer Daugherty had the right to search defendant's room, he obviously had the right to enter it.

A host of cases hold that if a defendant is arrested at his dwelling, and is allowed to go to another part of it for some

[2]The majority correctly notes that the plain view doctrine is applicable only if the police inadvertently observe what they immediately know is evidence from a place they are entitled to be. The "inadvertence" and "immediate knowledge" requirements were clearly satisfied in this case.

purpose, the police may accompany the defendant there and any evidence they inadvertently observe is admissible under the plain view doctrine. *See, e.g., United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977) (officer could accompany defendant to another room "to maintain a 'watchful eye' on her and to assure that she did not destroy evidence or procure a weapon"); *Moffett v. State*, 291 Ala. 382, 281 So. 2d 630 (1973), *cert. denied*, 414 U.S. 1161, 39 L. Ed. 2d 114, 94 S. Ct. 924 (1974); *People v. Stevens*, 38 Cal. App. 3d 66, 113 Cal. Rptr. 49 (1974); *People v. Green*, 14 Ill. App. 3d 972, 304 N.E.2d 32 (1973), *cert. denied*, 417 U.S. 972, 41 L. Ed. 2d 1143, 94 S. Ct. 3179 (1974); *People v. Mann*, 61 Misc. 2d 107, 113, 305 N.Y.S.2d 226 (1969) ("certainly reasonable" for police to accompany defendant to bedroom and "keep him under continuous surveillance while he was putting on his clothing"); 2 W. LaFave, *Search and Seizure* § 6.4, at 420–21 (1978).

In all of the cases cited above, except *Brown*, the defendant was allowed to move about after being arrested in his dwelling, as contrasted to being arrested outdoors as in the present case. This is not a difference of constitutional magnitude which distinguishes the cited cases from the present case. The focus of those cases was not on the locus of arrest, but rather on the reasonableness of searching the room an arrestee requests to enter, or the reasonableness of accompanying an arrestee when he is permitted to move about his dwelling. The rationale of those cases (concern for police safety, avoiding possible destruction of evidence, and discouraging potential escape attempts), which found such police conduct reasonable, is equally persuasive when an arrestee outside his dwelling requests to enter it. As the arrestee moves about of his own volition, whether from one area of his dwelling to another or from outside his dwelling to inside it, the right of the police to make plain view seizures must necessarily expand correspondingly. *See* Kelder, *supra* at 68; *United States v. Griffith*, 537 F.2d 900, 905 (7th Cir. 1976); *United States v. Mason*, 523 F.2d 1122, 1125–26 (D.C. Cir. 1975) (by implication). I would hold

that, as a general rule, "[w]here a person in custody asks to be given access to an area, he has no basis to object that the arresting officers" (*Mason, supra* at 1126) accompany him to that area and keep him in view.

The officers meticulously observed the defendants' *Miranda* rights and advised both defendants of their absolute right to require a search warrant. They were advised that their consent must be voluntary and that they had a right to refuse consent. After conferring, the defendants consented to the search.

I would affirm the decisions of the trial court and the Court of Appeals.

STAFFORD and HOROWITZ, JJ., concur with BRACHTENBACH, J.

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,	)	
v.	)	MANDATE
NEIL MARTIN CHRISMAN and CARL PHILIP OVERDAHL, Petitioners.	)	No. 46750-1 WHITMAN County No. C-1799 Court of Appeals No. 2991-III

The State of Washington to: The Superior Court of the State of Washington

in and for WHITMAN County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on November 26, 1980, became the decision terminating review of this court in the above entitled case on December 31, 1980. This cause is mandated to the superior court from which the appeal was taken for further proceed-

ings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows:
$25.00 in favor of petitioners and against respondent.

An Order Denying Motion for Reconsideration was entered December 31, 1980; copy attached.

cc:
Aitken, Schauble, Patrick,
Neill & Charawell
Mr. Robert F. Patrick
Mr. Stephen Bishop
Hon. Ronald R. Carpenter
Whitman County Prosecutor
Mr. Gerald R. Fuller, Deputy
Reporter of Decisions
Court of Appeals, Div. III

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 8th day of January, A.D. 1981.

/s/ John J. Champagne
JOHN J. CHAMPAGNE
Clerk of the Supreme Court,
State of Washington

Attached
cl

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

NEIL MARTIN CHRISMAN, ET AL,

Petitioners.

No. 46750

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided by a vote of 5 to 3 that the respondent's motion for reconsideration should be denied,

It is order that the motion be and it hereby is denied.

Dated this 31st day of December, 1980.

/s/ Robert F. Utter
Chief Justice

94 Wn.2d 711